

¹ The United States stipulates that the Defense has presented enough evidence to raise, but not decide, the issue of a potential violation of Article 13, UCMJ.

3. MSgt Craig Blenis, Programs Chief, 29 July 2010 to Transfer to JRCF
4. CPT Joseph Casamatta, Commander, HHC, USAG, 29 July 2010 to 1 July 2012
5. Col Daniel Choike, Commander, MCBQ, 29 July 2010 to Transfer to JRCF
6. LCpl Jonathan Cline, Guard/Escort, during Incident on 18 January 2011
7. COL Carl Coffman, Commander, USAG, Ft Myer, 29 July 2010 to Present
8. GySgt William Fuller, Admin Chief, 29 July 2010 to Transfer to JRCF
9. CWO5 Abel Galaviz, Head, Corrections Section, PP&O, PS Division, PSL Branch, 29 July 2010 to Transfer to JRCF
10. SSG Ryan Jordan, Army Liaison at MCBQ, 29 July 2010 to Transfer to JRCF
11. MSgt Brian Papakie, Brig Supervisor, 29 July 2010 to Transfer to JRCF
12. CAPT Jonathan Richardson, Medical Officer at Theater Field Confinement Facility in Kuwait (TFCF), 27 May 2010 to 28 July 2010
13. LTC Robert Russell, General Psychiatrist at MCBQ, April 2011
14. Mr. Joshua Tankersly, Guard/Escort, during Incident on 18 January 2011
15. GM2 Terrance Webb, Duty Brig Supervisor, during Incident on 18 January 2011
16. LCDR Eve Weber, Medical Officer at TFCF, 27 May 2010 to 28 July 2010
17. 1SG Bruce Williams, 1SG, HHC, USAG, 29 July 2010 to Present
18. Maj Timothy Zelek, Deputy Inspector General Marine Corps Base Quantico, December 2010

FACTS

The United States stipulates to charges in Defense Motion ¶ 6. *See* Charge Sheet. The United States disputes that the accused was held in conditions tantamount to solitary confinement.

The United States stipulates to Defense Motion ¶¶ 7-9.

The United States stipulates to Defense Motion ¶ 10. The United States and Defense have proposed multiple filing dates, to include 15 June 2012, 27 July 2012, and 7 September 2012 for the Defense Motion to Dismiss for Unlawful Pretrial Punishment (Defense Article 13 Motion). *See* Appellate Exhibit I, Appellate Exhibit XX, Appellate Exhibit XLIV, Appellate Exhibit XLV, Appellate Exhibit CXIII.

The United States stipulates to Defense Motion ¶ 11.

The United States stipulates to Defense Motion ¶ 12; however, the United States disputes the Defense's description of the contents of the emails.

LtGen Flynn did not issue an order to keep the accused in maximum custody (MAX), suicide risk (SR), or prevention of injury (POI). *See* proffered testimony of Col Choike. LtGen Flynn received reports regarding the accused's confinement. *See id.*

Col Choike did not issue an order to keep the accused in MAX, SR, or POI. *See* proffered testimony of Col Choike. Col Choike received reports regarding the accused's confinement. *See id.*

Col Oltman did not issue an order to keep the accused in MAX, SR, or POI. *See* proffered testimony of Col Oltman. Col Oltman received reports regard the accused's confinement. *See id.*

CWO4 Averhart independently decided the accused's custody classification and status based on his judgment; CWO4 Averhart was not influenced by an order from any senior officer. *See* proffered testimony of CWO4 Averhart.

CWO2 Barnes independently decided the accused's custody classification and status based on her judgment; CWO2 Barnes was not influenced by an order from any senior officer. *See* proffered testimony of CWO2 Barnes.

The members of the Classification and Assignment (C&A) Boards exercised independent judgment and were not influenced by a commanding officer. *See* proffered testimony of MSgt Blenis, GySgt Fuller, SSG Jordan.

The IG report was initiated by Maj Zelek of his own volition. *See* proffered testimony of Maj Zelek. The report's conclusions were reached independently. *See id.*

CWO5 Galaviz's report and its conclusions were reached independently. *See* proffered testimony of CWO5 Galaviz.

LEGAL AUTHORITY AND ARGUMENT

Due process protects a servicemember from punishment prior to conviction and sentencing. *United States v. Adcock*, 65 M.J. 18, 19-20 (C.A.A.F. 2007) (citing *United States v. McCarthy*, 47 M.J. 162, 164-65 (C.A.A.F. 1997)). The nature of the government function and accused's interest affected by the governmental action determine the procedures required to satisfy due process. *See Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (quoting *Cafeteria & Restaurant Workers Union, etc. v. McElroy*, 367 U.S. 886, 895 (1961)). Arbitrary or purposeless restrictions violate Article 13, UCMJ (Article 13). *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989). Furthermore, a government agency must abide by its own regulations "where the underlying purpose of such regulations is the protection of personal liberties or interests." *Adcock*, 65 M.J. at 23 (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980)). Arbitrarily placing a detainee in restrictive conditions without consideration of factors relevant to the detainee violates Article 13 and due process. *See United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011) (citing *United States v. King*, 61 M.J. 225, 228-29 (C.A.A.F. 2005)); *see also United States v. Best*, 61 M.J. 376, 390 (C.A.A.F. 2005) (citing *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (deciding that although servicemember does not have a constitutional right to a sanity board, the board, once ordered, must be conducted in a manner consistent with due process, which includes the right to a fair and impartial adjudicator).

Independent decisions reached during administrative processes uphold the accused's right to procedural due process. The Brig's decision makers, to include the Brig commanding officers, CWO4 Averhart and CWO2 Barnes, exercised independent judgment. The members of

the C&A Boards also reached conclusions based on their independent assessments. The emails cited by the Defense describe reports sent to members in the Marine Corps Base Quantico (MCBQ) chain of command.² The chain of command was reasonably interested in a matter garnering media attention. The emails demonstrate the concern within the chain of command for a Soldier's safety and interest in being informed. Accordingly, the exercise of command responsibility does not amount to improper influence. The Brig commanding officers and staff will testify that they exercised independent judgment in making their recommendations and determinations. Therefore, the chain of command's limited involvement did not violate procedural due process.

Under Navy Instructions, commanding generals of Marine Corps installations maintain responsibility for confinement facilities. U.S. Department of Navy Instruction 1640.9C (SECNAVINST 1640.9C) Art. 1201(5)(d) at 1-6 to 1-7 (3 January 2006) (“[C]ommanding generals of Marine Corps installations, through the chain of command, are directly responsible for operations of confinement facilities within their claimancy/installation.”); *see also* U.S. Department of the Army Regulation 190-47 (AR 190-47), The Army Corrections System, para. 1-4(h) (15 June 2006) (stating that commanders of installations are responsible for the safe operation of the local Army correctional facilities and compliance with policies set forth in AR 190-47). Furthermore, Navy Instructions describe chain of command involvement as “essential” to the operation of confinement facilities. SECNAVINST 1640.9C Art. 1201(5)(d) at 1-6.

The Defense alleges that concern for the accused's safety and receipt of reports on the accused's confinement amounted to improper influence. *See* Defense Supplement ¶¶ 20, 31, 33. A commander's receipt of reports does not amount to unlawful command influence because the commanders at MCBQ did not accuse the accused nor convene a court-martial. *See United States v. Ashby*, 68 M.J. 108, 128-29 (C.A.A.F. 2009) (holding that interest in the administrative proceeding as part of official capacity is not unlawful command influence). Here, the chain of command at MCBQ properly maintained awareness and received reports as commanding officers. Indeed, the involvement of the chain of command is explicitly encouraged by the Navy Instructions. *See* SECNAVINST 1640.9c Art. 1201(5)(d) at 1-6. Accordingly, the limited involvement by the chain of command in the accused's confinement did not amount unlawful or improper influence.

² During the accused's confinement, LtGen Flynn was the Commanding General, Marine Corps Combat Development Command. Col Choike was the garrison commander, Marine Corps Base Quantico. Col Oltman was the commanding officer of the MCBQ Security Battalion, which consisted of the pretrial confinement facility (the Brig), military police, and fire department at MCBQ. Therefore, the chain of command went up from the Brig commanding officer, CWO4 Averhart or CWO2 Barnes, to Col Oltman as head of Security Battalion, to Col Choike as garrison commander of MCBQ, to LtGen Flynn.

CONCLUSION

The accused is entitled to **no more than seven days confinement credit** for the time he spent on SR after a psychiatrist recommended removing him from SR. Therefore, the accused's confinement did not otherwise violate Article 13 and the accused is not entitled to additional confinement credit. For the foregoing reasons, the United States respectfully requests that the Court deny, in part, the Defense Motion and Defense Supplement.



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I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 7 September 2012.



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